



STATE BOARD OF EQUALIZATION

PROPERTY AND SPECIAL TAXES DEPARTMENT

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June 27, 2013

Mr. Jesse McClellan  
McClellan Davis, LLC  
8928 Volunteer Lane, Suite 200  
Sacramento, CA 95826

Dear Mr. McClellan:

The State Board of Equalization (BOE) wants to thank you for appearing at the May 22, 2013, Taxpayers' Bill of Rights Hearing and for your letter dated May 13, 2013 to Mr. Todd Gilman, Taxpayers' Rights Advocate. You ask in your presentation and letter that the BOE promulgate a regulation to clarify and explain the tax application of sales to Indians under the Cigarette and Tobacco Products Tax Law (CTPT) and if possible to have it align with the Sales and Use Tax Regulation 1616, *Federal Area*. You explained that the purpose of your request is to provide clarification to cigarette and tobacco products distributors regarding the taxability of sales to Indians and to address what you perceive as an inconsistency in the administration of these two tax laws on sales to Indians.

California's CTPT is a tax that is imposed upon every distributor for the distribution of cigarettes or tobacco products as per section 30101. A distribution is defined in CTPT section 30008 as including "(a) the sale of untaxed cigarettes or tobacco products in this state, (b) the use or consumption of untaxed cigarettes or tobacco products in this state, [or] (c) the placing in this state of untaxed cigarettes or tobacco products in a vending machine or in retail stock for the purpose of selling the cigarettes or tobacco products to consumers." A distributor is defined in CTPT section 30011 to include: "(a) every person who...distributes cigarettes, (b) every person who...distributes tobacco products, [or] (c) every person who sells or accepts orders for cigarettes or tobacco products which are to be transported from a point outside this State to a consumer within this State."

The imposition of tax under the CTPT and the Sales and Use Tax Law (SUT) are different in ways that are meaningful to your request. California's CTPT imposes tax on every distributor that distributes cigarettes or tobacco products. This imposition of tax is at the distributor level and occurs at the first distribution. Under SUT, tax is imposed on either the retailer (sales tax) or on the consumer/user (use tax). It is imposed at the final point of sale for a product from seller to consumer. The SUT transaction may have had several different distributions occur before sales tax was imposed while CTPT would have had tax imposed on the first distribution that occurred in the state.

The sales tax and use tax are two different, complementary taxes that are imposed on two different persons, the retailer and the purchaser. In SUT Regulation 1616, the Board promulgated a rule providing that when an off-reservation retailer makes a sale on a reservation to an Indian purchaser, the BOE will regard it as a use tax transaction rather than a sales tax transaction. Sales tax will not apply to the transaction (Reg. 1616, subd. (d)(4)(A)), but use tax may apply to the transaction

depending on how the purchaser uses the property. (Reg. 1616, subd. (d)(4)(D).) Thus, the BOE did not completely exempt such transactions from all SUT taxation. In contrast to the SUT, the CTPT can be imposed on only one person, the distributor. If the distributor's distribution were exempted, there is no complementary CTPT tax that could be applied to the purchaser. Because of this fundamental difference between the CTPT and the SUT, it is not possible for the BOE to promulgate a CTPT regulation that is analogous to SUT Regulation 1616.

For the foregoing reasons, we believe the change you request could only be effected through legislative enactment, not a regulation. A specific exemption would have to be written into the law or the point of taxation would have to be changed. Another option that is currently available to Indians who do not want to be charged the CTPT is for them to become voluntarily licensed with the State of California as a cigarette and tobacco products distributor. Upon licensing, they can lawfully purchase untaxed cigarettes or tobacco products from manufacturers or importers. For distributions made by an Indian on Indian land, sovereign immunity precludes the CTPT from being imposed because the incidence of tax falls on an Indian for activities on Indian land. However, if the Indian seller sells to a non-Indian, they would be obligated to collect and pay a tax that is owed by their purchaser.

The application of CTPT to Indians is explained in Publication 146, *Sales to American Indians and Sales in Indian Country*, under the *Cigarette and Tobacco Products Taxes* section on page 23. This section explains the CTPT application on sales of cigarettes and tobacco products to Indians. Since there is no special exemption from the CTPT for sales to Indians the application of the tax is similar to all other sales in California and therefore a regulation is not required to clarify or interpret the statute at this time.

I hope you find this information helpful. If you have additional questions, please contact Debra Kalfsbeek at (916) 323-9462.

Sincerely,

David J. Gau  
Deputy Director  
Property and Special Taxes Department

DJG: dk

cc: Honorable Jerome E. Horton, Chairman  
Honorable Michelle Steel, Vice Chair  
Honorable Betty T. Yee, First District  
Senator George Runner (Ret.), Second District  
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Ms. Lynn Bartolo, Chief, Special Taxes Policy and Compliance Division, MIC 57  
Ms. Debra Kalfsbeek, Manager, Program Policy and Administration Branch, MIC 31  
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